No. 421*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON d/b/a E. & R. SHANNON, *Appellees*.

BRIEF OF PRIVATE CARRIER CONFERENCE, INC., AMICUS CURIAE

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* Consolidated with No. 406, Red Ball Motor Freight, Inc., et al. v. Emma Shannon and Richard J. Shannon, d/b/a E. & R. Shannon.

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INDEX

TABLE OF CASES

STATUTES

MISCELLANEOUS

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OPINIONS BELOW

The opinion of the district court (R. 163) is reported at 219 F. Supp. 781. The report of the Interstate Commerce Commission (R. 17) is printed at 81 M.C.C. 337.

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JURISDICTION

The jurisdiction of this Court to review the judgment of the district court on direct appeal rests on 28 U.S.C. 1253 and 2101(b). The judgment of the three judge district court was entered on May 1, 1963 (R. 168). The appellants filed their notice of appeal in the district court on July 1, 1963 (R. 175). On November 12, 1963 this Court noted probable jurisdiction. 375 U.S. 901.

STATUTES INVOLVED

Involved are Sections 203(a)(14), 203(a)(15), 203(a)(17), 203(c), 206(a), 209(a) of the Interstate Commerce Act, 49 U.S.C. 303(a)(14), 303(a)(15), 303(a)(17), 303(c), 306(a), 309(a), respectively, printed as Appendix III to the Jurisdictional Statement of the Appellants (pp. 35a-37a).

QUESTION PRESENTED

Whether the district court applied the wrong standard for determining, under Section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance of, a primary business enterprise (other than transportation)" of a carrier and thus is private rather than for-hire transportation.

STATEMENT

The Commission instituted on its own motion an investigation of appellees' operations. After hearing, the Commission found that appellees were engaging without authority as interstate motor contract carriers of sugar and ordered them to cease and desist. The district court set aside the order and from that judgment an appeal has been taken by the United States and the Commission to this Court.

1. The Operations of the Appellees

The appellees, a partnership, are engaged in the business of buying and selling livestock and other goods. Their principal business headquarters which includes a warehouse is located in San Antonio, Texas. (R. 67, 106, 113). The business includes dealing in fertilizer, feed-grains, molasses, and salt and since 1954 in sugar. (R. 66-67). These goods are picked up and delivered by appellees by common carriage and with their own trucks (R. 97, 115-116). Except for the transportation of sugar, appellees' transportation in their own vehicles of these items is not contended to be anything other than private carriage. (R. 67, 75).

The appellees' dealings in sugar were begun in 1954. They purchase sugar after delivering in their own vehicles shipments of livestock and other merchandise to customers at or near the site of a sugar refinery in Supreme, Louisiana. (R. 66-67, 107-108, 112). In the normal case, the appellees sell the sugar in truckload lots while it is in transit or within a day or two of the date on which it is picked up by their vehicles at Supreme, Louisiana (R. 75-76, 117-118). Ordinarily, deliveries are made directly from the refinery to the ultimate customers of the appellees who are unsually located in the San Antonio area (R. 68, 83-84). Approximately one-half a truckload of sugar inventory is maintained in the warehouse of the appellees for sale in small lots (R. 68, 76-77, 80-81).

The warehouse is used primarily for storing and milling of feed stuffs (R. 74-75, 87-88). Appellees made a gross average profit of about 25¢ per hundred pounds on each truckload of sugar handled by them (R. 117-118). The respective rail and truck rates

for transportation of sugar between the same points are 69¢ per hundred pounds on rail carload shipments and $1.09 per hundred pounds on truckload shipments (R. 77, 119-126).

2. The Decision of the Interstate Commerce Commission

The Commission held that the appellees' transportation of sugar constituted for-hire rather than private carriage and ordered them to cease and desist therefrom unless and until they obtained appropriate operating authority. Unlike their transportation of livestock, feeds, and fertilizers, the Commission took the position that the transportation of sugar was not within the scope and in the furtherance of a non-transportation business and hence was not private carriage, 81 M.C.C. 347 (R. 30). The Commission said that under Section 203(c) of the Interstate Commerce Act, the basic touchstone for determining whether transportation conducted by someone whose primary business is not transportation is "whether the operations are in bona fide furtherance of a primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed", 81 M.C.C. 343 (R. 25).

3. The Decision of the District Court

The district court set aside the order on the ground that the Commission finding that the appellees had engaged in for-hire carriage was not supported by substantial evidence, 219 F. Supp. 782-83 (R. 167). Describing the evidence, the court stated that the sugar was only one of a number of commodities which the appellees bought and sold and that the appellees were

engaged in the business of buying and selling goods. The district court went on to state that the appellees normally purchased sugar without having received orders for it; that a relatively small portion of the appellees' assets and payroll were devoted to transportation activities; that the appellees took title to the sugar and assumed the risks of loss or damage in transit or of price fluctuations; that the appellees sold the sugar on credit and sizable accounts receivable were outstanding; that they maintained a reasonable inventory of sugar, that they assessed no identifiable transportation charge and that the appellees do not hold themselves out to the general public to haul sugar for compensation, 219 F. Supp. 782 (R. 166-67).

The district court did not refer explicitly or implicitly to Section 203(c) of the Act. It did not cite any cases enunciating the "primary business test" as a basis for its decision. Moreover, the district court did not discuss the facts upon which the Commission based its determination that the appellees backhaul transportation of sugar was not within the scope and in the furtherance of a primary business enterprise other than transportation.

4. The Interest of the Amicus Curiae

The question before this Court is of great interest to the Private Carrier Conference, Inc. (PCC). PCC, affiliated with the American Trucking Associations, Inc., is a national organization of shippers who operate motor vehicles in interstate commerce incidental to, within the scope of, and in furtherance of nontransportation primary businesses. The several thou-

sand members of the Private Carrier Conference range from large manufacturing companies who operate hundreds of large motor vehicles to the local small businessman who utilizes trucks in local operations. Organized and existing as a non-profit corporation under the laws of the State of Delaware, PCC maintains offices at 1616 P Street, N. W., Washington, D. C. The essential function of the Private Carrier Conference as a trade association is to preserve and maintain the right of shippers to choose on a free and unrestricted basis private carriage as a means of meeting their transportation needs in the United States.

Transportation by motor vehicle over the highways is an essential part of the national transportation system which the Interstate Commerce Act is designed to regulate, develop, and preserve. The correct interpretation of Section 203(c) and its relationship to other parts of the Act is vital to the maintenance of the national transportation system. This section of the Act codifies the "primary business test" enunciated in scores of Commission and court decisions prior to the codification of this test in the 1958 amendment to this section of the Act. The Commission and court cases prior to this codification and since which have utilized the "primary business test" as the touchstone of private carriage have received the unqualified support of the Private Carrier Conference which believes that this is the sole test that the Commission, the courts and the Congress intended should be used in determining and distinguishing private from other forms of carriage.

This brief, *amicus curiae*, is submitted not for the purpose of taking any position on the facts of this case

which the Conference is not going to do, but solely for the purpose of expressing the Conference's view that the outcome of this appeal should be determined solely by the relationship of the facts of the operation as presently or if the need arises as subsequently developed to the "primary business test." This brief, *amicus curiae*, is submitted with the consent of all parties to this appeal pursuant to the provisions of Rule 42(2) of this Court.

5. The Consequences of an Adverse Decision

PCC is not taking any position as to whether this Court should affirm or reverse the district court decision in terms of the ultimate result reached by the district court. For this Court to follow either course without an express declaration that the "primary business test" as codified in Section 203(c) of the Act is the sole standard for distinguishing private from for-hire carriage could lead to a widespread disregard and disuse of the "primary business test" as the touchstone of private carriage. Decades of refinement of this test would be severely jeopardized. If this happened, the many thousands of private carriers in the United States could be faced with considerable uncertainty as to whether or not their particular operations might be subject to restrictive legislation redefining private carriage because of the disruptive economic effect of the district court decision on the regulated for-hire carriage industry. Since this is the first time this Court has been asked to interpret the effect of the 1958 amendment of Section 203(c) of the Act, the interest of the PCC is clear.

SUMMARY OF ARGUMENT

The "primary business test" is the sole basis for distinguishing private from for-hire carriage. In concluding in the case at bar that the instant operations constituted private carriage, the district court committed serious error by not analyzing the operations against the "primary business test" codified in Section 203(c) of the Interstate Commerce Act. Only by so doing would the district court have been in a position, assuming an adequate record, to make a determination as to the classification of the carriage in question.

ARGUMENT

The History of the "Primary Business Test" Indicates That There Is No Other Test of Private Carriage

At this time, the "primary business test" is the sole basis for distinguishing lawful private carriage from for-hire operations in interstate commerce. This test was developed over a period of three decades. Shortly after the Motor Carrier Act of 1935 was enacted into law and made a part of the Interstate Commerce Act, the Commission and the courts were faced with the necessity for adopting some standard or basis for distinguishing lawful private carriage from economically regulated forms of carriage, namely, common carriage and contract carriage, for which appropriate authority is required from the Interstate Commerce Commission. Inasmuch as, therefore, the "primary business test" as enunciated in the 1958 amendment to Section 203(c) of the Act was not utilized or alluded to by the district court, a discussion concerning the beginnings, development, and present status of the primary business test is in order.

The only definition of a private carrier originally included in the Motor Carrier Act of 1935 was Section 203(17). Section 203(17) of the Motor Carrier Act of 1935 reads as follows:

> The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by vehicle" who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

The first case involving the question of private versus for-hire carriage in a situation where the identity of a carrier was not in question was *McBroom Contract Carrier Application,* 1 M.C.C. 425 (1937). This case interpretated the meaning of Section 203 (a)(17) of the Motor Carrier Act in a situation involving a return or backhaul of commodities for sale at prices approximating their cost plus the cost of transportation. Using Section 203(a)(17) as the test, the Commission held that the backhaul, eventhough the applicant held title to the commodities, could not be accomplished without appropriate operating authority from the Interstate Commerce Commission. It is interesting to note that the very first case interpreting Section 203(a)(17) was one wherein the Commission was faced with a backhaul movement.

This case was decided early in 1937. Some five months later, the Commission decided two more cases: *Congoleum-Narin, Inc.,* 2 M.C.C. 237 (1937) and *Lyle H. Carpenter,* 2 M.C.C. 85, (1937). These three cases laid the basis for what has come to be known as

the "primary business test". The Commission commented in the *McBroom* case (supra) at 1 M.C.C. 427 that:

> Applicant purports to be transporting property of which he is owner for the purpose of sale. It will be noted from the . . . . [definition of a private carrier], however, that this alone is not sufficient to make this transportation that of a "private carrier of property by motor vehicle," because it must also be established that he is not performing such transportation for compensation as a common or a contract carrier. Further inquiry would be necessary to arrive at a definite conclusion, but the evidence available strongly suggests that this back-haul transportation is in reality for compensation as a common carrier.

Expanding this, the Commission said in the *Lyle H. Carpenter* case (supra) at 2 M.C.C. 86 that:

> A conclusion that the operation is that of a private carrier would lend sanction to the theory that a person who is engaged in the transportation of property by motor vehicle, for compensation, as his regular operation or business is not subject to appropriate regulation of his operations in interstate or foreign commerce if he elects to become the owner of the property throughout the course of its transportation by him. . . . [However], the specific definitions of carriers and the general policy declared in the act clearly warrant the conclusion that any person engaged primarily in the transportation of property in interstate or foreign commerce by motor vehicle, for compensation, is a common or contract carrier according to the nature of his undertaking, and is subject to regulation as such regardless of the ownership of the property transported. This conclusion is, of course, not applicable to motor vehicle operations which are merely incident to the conduct of some

other commercial enterprise, such as that of a mercantile or manufacturing concern.

In *Congoleum-Nairn, Inc.*, a manufacturer transported its manufactured goods among its own plants, between these plants and railroad or steamship loading facilities, and also from the plants to its customers. Title in the goods remained in the manufacturer until delivered to a railroad or steamship line for further transportation, or until delivered to the consignee in the case of direct deliveries. The Commission, in discussing this case, developed the other side of the test set forth in *Carpenter* when it said at 2 M.C.C. 240 that:

> The facts of record clearly establish that applicant is not engaged primarily in the transportation of property and that it is in no sense a carrier for hire in its motor-vehicle operations. Such operations are conducted by it as an integral part of its business of manufacturing and selling the commodities described and are therefore clearly distinguishable from those described in . . . [the *Carpenter* case]. It is clear, therefore, that in these motor-vehicle operations, incidental to its private business, applicant is a private carrier within the terms of the . . . [private carrier] definition.

The Commission's "primary business test," as developed in the *McBroom*, *Carpenter*, and *Congoleum-Nairn* cases, may be expressed as follows: Any party primarily engaged in the transportation of property in interstate or foreign commerce by motor vehicle for compensation is a common or contract carrier, regardless of ownership of the property transported; but any party primarily engaged in a non-transportation business enterprise who transports property in motor

vehicle operations which are an integral part of, or incidental to, the conduct of his principal business is a private carrier. This test was applied consistently in numerous Commission decisions between 1938 and 1943.[1]

Reviewing thoroughly the many cases involving this aspect of the question of private versus for-hire carriage, the Commission said in a now famous case, *L. A. Woitishek*, 42 M.C.C. 193, 205-06 (1943) that:

> After careful reconsideration of the entire subject, we are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transporation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decisions. Neither does it follow that an operator having a bona fide

[1] L. A. Woitishek, 42 M.C.C. 193 (1943); Robert McIntosh Howard, 41 M.C.C. 551 (1942); S. W. Pitchenik, 34 M.C.C. 353 (1942); Ulrich Oil Co., 34 M.C.C. 147 (1942); Reyes Ogas, 32 M.C.C. 437 (1942); John H. Dull, 32 M.C.C. 158 (1942); Glosserman Chevrolet Co., 27 M.C.C. 471 (1941); Enterprise Trucking Corp., 27 M.C.C. 471 (1941); Intermountain Trucking Co., 26 M.C.C. 456 (1940); Dan S. Dugan, 26 M.C.C. 233 (1940); Henry R. Rossmiller, 22 M.C.C. 781 (1940); James M. Youngson, 21 M.C.C. 625 (1940); Gustave Spanhake, 21 M.C.C. 258 (1939); Flois M. Murphy, 21 M.C.C. 54 (1939); Charles G. Monk, 20 M.C.C. 115 (1939); Thornburgh Sales Co., 20 M.C.C. 39 (1939); Louis Sultan, 18 M.C.C. 165 (1939); Louis O. Cyr, 17 M.C.C. 658 (1939); Sterling Express, Inc., 17 M.C.C. 379 (1939); Samuel O. Hammond, 14 M.C.C. 711 (1939); Durango Mercantile Co., 13 M.C.C. 789 (1939); James Christy, 13 M.C.C. 779 (1939); Victor Swanson, 12 M.C.C. 516 (1939); Roger L. Howrigan, 11 M.C.C. 455 (1939); Economy Oil Co., 13 M.C.C. 427 (1938); D. L. Wartena, Inc., 4 M.C.C. 619 (1938).

business other than transportation may not also be a carrier for hire if it appears that any transportation which he performs is not primarily in furtherance of his noncarrier interest but rather is performed with a purpose to profit from the transportation as such. In short, each case must be determined upon its own particular facts and neither the receipt of compensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive.

Before *Brooks Transportation Co.* v. *United States*,[2] the two most important cases involving the problem of private versus for-hire carriage were *ICC* v. *Clayton*[3] and *A. W. Stickle & Co.* v. *ICC*,[4] which support the "primary business test" approach.[5]

In the *Clayton* case, Clayton was engaged in the coal business, devoting one-third to one-half of his time to its sale, paying for the coal transported, owning it until he delivered it to a customer, and transporting it for the purpose of sale. He did not buy to fill a particular prior order but transported enough to take care of what he estimated would meet customer requirements. He filled orders as received, both from his loaded truck and from the coal stored in his yard, and made no differentiation in price between coal

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[2] 93 F. Supp. 517 (E.D. Va. 1950), aff'd mem., 340 U. S. 925 (1951).

[3] 127 F. 2d 967 (10th Cir. 1942).

[4] 128 F. 2d 155 (10th Cir.), cert. denied, 317 U. S. 650 (1942).

[5] Others were Beggs v. Kroger Co., 167 F. 2d 700 (8th Cir. 1948); ICC v. Tank Car Oil Corp., 151 F. 2d 834 (5th Cir. 1945); ICC v. Jamestown Sterling Corp., 64 F. Supp. 121 (W.D.N.Y. 1945); Schenley Distillers Corp. v. United States, 61 F. Supp. 981 (D. Del. 1945), aff'd per curiam, 326 U. S. 432 (1946).

delivered near his yard and that delivered to points requiring a longer haul. Price was determined by competitive conditions and he realized a profit, both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both. The court found that Clayton was in the "bona fide coal business" and that the trial court was warranted in finding that he was a private carrier.

In the *Stickle* case, Stickle bought, transported, and sold lumber. Prior to the delivery to a customer and normally before the lumber had been purchased by Stickle, a contract would be entered into to sell the lumber to a customer and to transport it to the customer's yard. Thus, Stickle received pay both for the lumber and for its transportation to the customer. The major portion of Stickle's capital investment was in the transportation enterprise, the major portion of its payroll went to employees engaged in transportation activities, and its sale price was in excess of its purchase price by approximately the charge that would be made under established rates for the transportation of the lumber by a regulated common carrier. The court concluded that in substance and reality Stickle was engaged primarily in the transportation of lumber in interstate commerce and that it was a contract carrier within the meaning of the Act.

The fact that compensation for transportation was received in a form identifiable as such does not seem to have been controlling in either the *Clayton* or *Stickle* cases. Rather, the controlling question appears to have been whether the transportation was supplied with a purpose to profit from the transportation as such. *L. A. Woitishek*, 42 M.C.C. 193 (1943). There remained some question, however, as to whether a car-

rier, otherwise private, may receive, in addition to normal compensation for transportation performed, an additional profit from its motor carrier operations without thereby becoming a for-hire carrier. This question gave rise to the *Lenoir* case,[6] which in the courts became the *Brooks* case.[7]

In the *Lenoir* case the Commission recognized that there are a number of very good reasons, apart from a desire to set up a separate business for profit, which prompt mercantile or commercial concerns to conduct all or a portion of their own motor operations instead of relying on the services of for-hire carriers. Among those noted by the Commission were goodwill, control and exclusive use of carrier equipment, reduced loading problems, less rehandling of shipments, more certain delivery time, and less need for expensive packaging. The Commission went on to set forth the "primary business test," as it is now understood:

> If the facts establish that the primary business of an operator is the supplying of transportation

[6] Lenoir Chair Co., 48 M.C.C. 259 (1948), aff'd, 51 M.C.C. 65 (1949). The report on oral argument embraces Schenley Distillers Corp., 48 M.C.C. 405 (1948), aff'd, 51 M.C.C. 65 (1949). Some cases relying on Woitishek and Lenoir before the courts passed upon the latter are: Burlington Mills Corp., 53 M.C.C. 327 (1951); Jacob Menzi, 52 M.C.C. 109 (1950); Dominic J. Sarmento, 52 M.C.C. 91 (1950); Watson Mfg. Co., 51 M.C.C. 223 (1949); Ralph P. Salyards, 46 M.C.C. 303 (1946); Tyrrell's, Inc., 44 M.C.C. 552 (1945); Williams Bros., 44 M.C.C. 557 (1945); Benjamin L. Klein, 43 M.C.C. 451 (1944); Teeter & Sons, 43 M.C.C. 200 (1944); Ira Marcellus, 43 M.C.C. 128 (1944).

[7] Brooks Transp. Co. v. United States, 93 F. Supp. 517 (E.D. Va. 1950), aff'd mem., 340 U. S. 925 (1951). Since the Brooks case, two court cases in particular are difficult to reconcile. They are Taylor v. ICC, 209 F. 2d 353 (9th Cir. 1953), cert. denied, 347 U. S. 952 (1954), and Scott v. ICC, 213 F. 2d 300 (10th Cir. 1954).

> for compensation, then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. . . . If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed . . .
>
> We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status. . . . Each case must be determined on its own facts.[8]

The "primary business test" was directly at issue in the *Brooks* case wherein the Brooks Transportation Company and others brought suit to set aside the Commission's orders based on its finding that the Lenoir and Schenley concerns were not for-hire carriers. The facts were not in dispute. The three-judge district court considered the question of whether, whenever compensation for transportation is found, the carrier is, unless specifically excepted by a provision of the Act, a common or contract carrier. This has come to be known as the "compensation test." After considering the legislative history of the Act, the awareness by Congress of the Commission's "primary business test" and its failure to amend the Act, and the consequences of accepting the "compensation test," the court rejected it in favor of the "primary business test":

> We deem it not inappropriate to consider what might be called the economic approach to the prob-

[8] 51 M.C.C. at 75.

> lem before us, in the light of what might be called the felt needs and the best interest of the interstate carriers of goods by motor vehicle. In our considered judgment, such an approach strongly favors the *primary business test* as against the *compensation test*. And the problem before us is preeminently one that should be solved not by theoretical abstractions or excursions into juristic semantics but rather by practical common-sense. Just what type or measure of compensation was intended by Congress to bring the carriage within Section 203(a)(14) or (15) is best ascertained by the *primary business test*. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements.[9]

It was through affirmance of the *Brooks* case,[10] then, that the Commission's "primary business test" was approved by this Court.

Because of the alleged growth of illegal for-hire carriage of property by motor vehicle, resulting in an alleged erosion of the volume of traffic available for transportation by lawful public carriers, Congress attempted to protect both lawful private and for-hire carriers from motor carrier service which, although performed under the guise of private transportation, was actually public transportation.[11] It had in mind, in particular, the so-called buy-and-sell and back-haul operations performed only for the purpose of receiving compensation for the otherwise empty return of trucks.[12] To this end, Congress amended Part II of

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[9] 93 F. Supp. at 525.

[10] 340 U.S. 925 (1951) (mem.).

[11] S. Rep. No. 1647, 85th Cong., 2d Sess. 23 (1958); H.R. Rep. No. 1922, 85th Cong., 2d Sess. 18 (1958).

[12] S. Rep. No. 1647, supra note 11, at 23-24 (1958); H.R. Rep. No. 1922, supra note 11, at 17-18 (1958).

the Act so all commercial carriage of property by motor vehicle in interstate or foreign commerce must, with certain specific exceptions, fall within one or another of three classes: duly certificated common carriage, duly permitted contract carriage, or carriage solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter.[13] Congress did not want to interfere with legitimate private carriage, but rather its purpose was to write the "primary business test", as contained in the *Brooks* case, directly into the Interstate Commerce Act.[14] A recommendation of the ICC that the definition of a "private carrier of property by motor vehicle" be amended was rejected, but, in order to keep the door closed to reconsideration of the concept of the "primary business test," Congress added, in 1957, a separate subsection numbered 203(c).[15] The subsection provides that:

> . . . no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce . . . unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign

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[13] S. Rep. No. 1647, supra note 11, at 24-25.

[14] Id. at 24-25; H.R. Rep. No. 1922, supra note 11, at 18. Some "primary business" cases before codification were Carlton Housden, 76 M.C.C. 671 (1958); Ernest Braun, 76 M.C.C. 124 (1958); Dean S. Axtell, reentitled Caveman Transp., Inc., 76 M.C.C. 115 (1958); Roy J. Vollbracht, 76 M.C.C. 761 (1957); E. G. Menelaus, 72 M.C.C. 176 (1957); and Jay-Cee Transp. Co., 68 M.C.C. 758 (1956).

[15] 71 Stat. 411 (1957), as amended, 72 Stat. 574 (1958), 49 U.S.C. § 303 (c) (1958).

commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

This section as amended had the effect of codifying the "primary business test" as expressed in the *Lenoir* case regarding determination of what transportation activities are permitted within the scope of private carriage.[16]

Since the "primary business test" was codified, the Commission has considered a number of cases in which the test as set forth in the *Lenoir* case has been applied.[17] These cases show how the "primary business test" is now applied to determine the status of a particular carrier operation as a private or for-hire operation.

In one of these cases, Subler, a motor contract carrier operating under permits issued by the Commission authorizing transportation between certain points in seventeen states and the District of Columbia, transported sugar from sugar refineries in New York City, Philadelphia, and Baltimore to points in Ohio, West Virginia, and Michigan. Subler had no authority to perform this sugar transportation, its authority being limited to transporting various commodities from

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[16] Fraering Brokerage Co., 81 M.C.C. 337 (1959).

[17] E.G., E. E. Mumby, 82 M.C.C. 237 (1960); Fraering Brokerage Co., 81 M.C.C. 337 (1959); L. F. Campbell, 81 M.C.C. 223 (1959); Subler Transfer, Inc., 79 M.C.C. 561 (1959); Pettapiece Cartage & Builder's Supplies, Ltd., 79 M.C.C. 259 (1959); Roy D. Yiengst, 78 M.C.C. 96 (1958), rev'd on other grounds, 79 M.C.C. 265 (1959); Riggs Dairy Express, Inc., 78 M.C.C. 574 (1958); William P. Hoyt, 78 M.C.C. 437 (1958); Cecil Payne Supply Co., 78 M.C.C. 405 (1958); Monkem Co., 78 M.C.C. 152 (1958).

from points in the Midwest to points in the East. The sugar was transported under buy-and-sell arrangements and one of Subler's employees admitted that the purpose of such arrangements was to obtain additional westbound tonnage to balance the carrier's eastbound movements. As Subler had established a sales division within its corporate organization for the purpose of buying and selling sugar, it was argued that it was engaged in more than one primary business, including the merchandising of sugar, the leasing of equipment, and for-hire carriage. Hence the merchandising operations in sugar were supposedly not carried on for the purpose of obtaining return shipments to balance its for-hire carrier operation. The Commission, applying the test of the *Lenoir* case, said:

> The record clearly establishes that Subler's primary business is that of a for-hire carrier, and that Subler began transporting the involved sugar, under arrangements with the respondent brokers herein, so as to obtain westbound traffic to balance its eastbound operations. . . . Subler's transportation activities in connection with these sugar transactions are not and have not been incidental to any bona fide nontransportation business, and the "Merchandise Sales Division" set up within its organization is nothing more than a subterfuge to avoid regulation. . . . Although it is entirely possible that a for-hire carrier can be engaged . . . in bona fide private carriage in furtherance of a separate noncarrier business, such is not the case here.[18]

While the *Subler* case stands as a clear example of a situation where, despite protestations to the contrary, the carrier was engaged primarily in the business of

[18] Subler Transfer, Inc., 79 M.C.C. 561, 569-70 (1959).

suppling transportation for compensation, the *Fraering case*[19] involved a carrier which was not engaged in transportation as a primary business. In this case, the important question was whether certain sugar transportation operations were in furtherance of the primary business of the carrier, or whether they were merely related or secondary enterprises conducted with the purpose of profiting from the transportation performed. In this case the Commission concluded that the purpose of the sugar transportation was to reduce the cost of transporting other commodities on reciprocal hauls, and that the challenged sugar transportation had only an indirect relation to the primary noncarrier business in furtherance of which the reciprocal haul was performed. Thus such transportation was in furtherance of contract carriage and only secondarily related to the primary noncarrier commercial enterprise of the carrier. It found, therefore, that as the reduction of the cost of transportation on the reciprocal haul constituted a profit, the operation was for-hire carriage within the licensing provisions of Part II of the Interstate Commerce Act.

In other cases, the primary business of the carrier was established on facts related to the operations under investigation. The pattern of elements which constituted the challenged enterprises determined, in essence, what the carrier's primary business was within the meaning of the "primary business test." The *Stutzman* and *Campbell* cases, subjects of a single Commission report[20] involved simple buy-and-sell trans-

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[19] Fraering Brokerage Co., 81 M.C.C. 337 (1959) (combined with Emma Shannon).

[20] Virgil P. Stutzman, 81 M.C.C. 223 (1959) (combined with L. F. Campbell).

actions. The transportation performed in connection therewith could have been consistent with either a purpose of profiting from the transportation itself or a purpose of furthering the transporters' purported dealerships in salt. Stutzman was found to be a for-hire carrier; Campbell was found to be a private carrier.

The major portion of Stutzman's capital investment consisted of motor vehicles. He maintained a token warehouse but did not maintain a stock of salt on hand for sale. Rather, he transported it directly from the mines to consignees in response to specific orders received. The payment obtained by him included the cost of the salt, a charge based on the actual transportation mileage, and a fixed charge for unloading. Campbell maintained a stock of various types of salt at his warehouse and usually filled orders from his stock inventory. From time to time he purchased sufficient stock to replenish his inventory and to meet anticipated or existing orders. All orders were obtained by Campbell through his own efforts, and ordinarily he obtained orders after he purchased his salt from the mines. The Commission resolved the question of the carriers' primary business without specific reference to the purpose of the transportation, an aspect of the question which on the facts presented required no discussion. It was evident that Stutzman's operation had all of the significant qualities of for-hire carriage. And, once it was established that Campbell's primary business was the buying and selling of salt, the Commission was able to find without discussion that the transportation was performed as an incident thereto and not merely as a profitable secondary enterprise.

In the *E. E. Mumby* case,[21] account was taken of the increasing number of cases of its type coming before the Commission, often involving sugar or some other fungible commodity. All secondary parties to the proceeding, as well as the carriers themselves, were ordered to cease and desist from participating in operations found to be unlawful. Included among the secondary parties interested in, or affected by, the operations were sugar refiners, brokers, flour millers, and a wholesale dealer in flour. They were found to have known, or to have had reason to know, that, from the nature of the arrangements in which they participated, the Mumby operations constituted a for-hire transportation service.

The Commission's determination of the Mumby's primary business and status from the pattern of elements constituting the challenged enterprise is an interesting application of the "primary business test." The Mumbys purchased the sugar transported, quoted a delivered price, employed, on occasion, brokers to sell sugar for them, extended credit to purchasers, assumed the risk of fluctuating market by purchasing the sugar under firm contracts extending over several months, and stored about 10% of the sugar at their warehouse for resale to some of their purchasers. But the prime service they rendered was the furnishing of motor carrier transportation, and the Commission found that the primary purpose of their sugar dealings was to profit from its transportation. The Commission also found that the Mumby's warehouse operation was dependent upon the transportation-motivated

[21] E. E. Mumby, 82 M.C.C. 237 (1960).

sugar activities and hence was subordinate and merely incidental to their transportation business.[22] The Mumby flour transactions were much less complex, and the Commission found that they were entered into solely for the purpose of performing and profiting from transportation, and that, in fact, transportation was the only real service performed by the Mumbys.

Two court decisions reviewing the reports and orders of the Commission in buy-and-sell cases are *Church Point Wholesale Bev. Co.* v. *United States,* 200 F. Supp. 508 (W.D. La. 1961), sustaining, *Church Point Wholesale Beverage Co.—Investigation,* 82 M.C.C. 457, and *Cahaba Steel Co.* v. *United States,* not reported (C. A. No. 2669, S.D. Ala., January 17, 1962), sustaining, *Cahaba Steel Company—Investigation of Operations,* 86 M.C.C. 759 (1961).

In the former case the court at 200 F. Supp. 512, deemed the Commission to have accurately summarized the plaintiffs' sugar operations, as follows:

> The purchasing and selling of truckloads of sugar is conducted in order to balance their motor vehicle operations from northern points where merchandise is purchased and transported southbound in connection with their wholesale operations in Louisiana. Sugar is purchased and transported to northern points only when need arises for a shipment of merchandise to supply their wholesaling activities. The sugar transactions are gen-

[22] The cease and desist order was not directed to the Mumbys' warehousing of sugar, and the Commission did not deny their right to distribute sugar from a warehouse and to provide transportation in connection therewith, provided that the warehousing was their primary business and the transportation performed was in furtherance of such valid nontransportation business.

erally-handled through respondent, Fox, a broker for a sugar refinery in New Orleans, who contacts a representative for respondent wholesalers who act on their behalf on the sugar transactions. Fox arranges both for the purchase of the sugar by respondent wholesalers from the refinery and for the sale of the sugar by the wholesalers at northern points. Most of the sugar is purchased by respondent wholesalers from the refinery with preexisting orders from the ultimate purchaser or consumer already on hand. None of the sugar is stored. Respondent wholesalers' vehicles are dispatched from their respective home terminals to the refinery at New Orleans, thence direct to the consumer's plant. The sugar is purchased by wholesalers from the refinery with their own funds and title rests with wholesalers during the transportation to the ultimate buyer.

The Commission distinguished between the nature of the plaintiffs' northbound transportation of sugar and their southbound transportation of groceries, liquor and beer at 82 M.C.C. 460-461, as follows:

> We see two distinct business enterprises which, although related, possess distinct characteristics. On the one hand, there is the wholesaling business of each respondent wholesaler, wherein merchandise is kept in stock and is sold and distributed to their respective customers. In connection with this enterprise and in order to stock their warehouse with a minimum of inventory, respondent wholesalers operate line-haul equipment which is used to pick up merchandise from manufacturers and other sources as the need arises. On the other hand, there is another business enterprise conducted by each of the respondent wholesalers, namely, the buying and selling of sugar. Here no inventory is kept, their marketing area is hundreds of miles beyond that of their respective wholesaling businesses, and sugar is purchased,

transported to northern points, and sold only when a truckload of merchandise from some northern point is needed in connection with their respective beverage or grocery wholesaling activities.

After discussing the Commission's earlier cases, the "primary business test" and the enactment of Section 203(c) of the Interstate Commerce Act, the court, at 200 F. Supp. 516-17, said:

> The language of the amendment is clear. Its purpose is unmistakable. The legislation clearly precludes all transportation conducted in connection with a commercial enterprise, unless the same is "within the scope" and "in furtherance of a primary business enterprise other than transportation." Both tests must be satisfied. Surely, plaintiffs' transportation of sugar to the midwest meets neither of these tests. The only relationship between the movement of sugar and plaintiffs' primary business of wholesaling is that the sums realized from the movement of the sugar serve to reduce the cost of conducting plaintiffs' other transportation activities. Surely, plaintiffs cannot be said to be in the business of the interstate wholesaling of sugar. Plaintiffs do not actively solicit customers for sugar, conduct no advertising of same, dispatch their trucks to carry sugar only when they are dispatched to pick up beer or groceries in the Midwest, and transport only sugar that is purchased under pre-existing orders. They have no investment in facilities other than equipment used in the transportation of the sugar and employ no personnel except those who drive the vehicles. The only service identifiable as such which plaintiffs actually perform for the ultimate purchaser of the sugar and from which they derive a profit is transportation.

The Commission's conclusion that plaintiffs' transportation of sugar falls within the prohibi-

tion of 203(c) is responsive to the plain language of the statute and is in complete accord with the Commission's construction thereof since its enactment. *Donald L. Wilson, et al.—Investigation of Operations*, 82 M.C.C. 651 (Div. 1, 1960); *Mumby Investigation of Operations*, 82 M.C.C. 237 (Div. 1, 1960); *Fraering Brokerage Co., Inc.—Investigation of Operations*, 81 M.C.C. 337 (Div. 1, 1959); *Stutzman—Investigation of Operations*, 81 M.C.C. 223 (Div. 1, 1959); *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 561 (Div. 1, 1959); *Riggs Dairy Exp., Inc.—Investigation and Revocation*, 78 M.C.C. 574 (Div. 1, 1958); *Monkem Co., Inc.—Investigation of Operations*, 78 M.C.C. 152 (Div. 1, 1958).

Conclusion

Plaintiffs' transportation of sugar to Midwest destinations in order to be lawful, since it is unauthorized, must be within the scope and in furtherance of their primary business as distributors at wholesale of groceries, liquor and beer within Louisiana. The relationship between the two distinct operations is tenuous at best. While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carrage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation. They concede that they handle the sugar for the profit accruing therefrom. That such transportation additionally achieves certain economies and efficiencies beneficial to the plaintiffs' wholesaling activities is not controlling. Plaintiffs'

justification of their northbound transportation would make a nullity of the primary business test, expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise.

In the *Cahaba* case decided shortly after the *Church Point* case, the court by per curiam judgment and decree sustained the cease and desist order of the Commission, upholding its conclusion, at 86 M.C.C. 764-65:

> The facts that title to the goods remains in the transporter until transportation is completed, or that the transporter assumes risk of damage or loss to the goods while in transit, or the maintenance by the transporter of a place of storage where some of the salt is held to await future purchases are not entirely controlling in determining the status of the operation. It is believed that the summarization shown in the letter reproduced in the appendix hereto, more particularly the third paragraph thereof clearly shows that the handling of salt is not a primary business of respondent and would not be continued if movements of steel to the origin areas of the salt were to be discontinued. . . . When, as here, a wholesaler of certain commodities transports such commodities in its own vehicles from point A in one State to point B in another State, it is engaging in bona fide private carriage, but when, to avoid an empty return haul, it buys certain goods at point B and transports them back to point A and there sells them, and where the evidence shows an intention

to profit from the return transportation as such, it is engaging in for-hire transportation subject to the certificate or permit requirements of the act. Compare, *Fraering Brokerage Co., Inc., Investigation of Operations*, 81 M.C.C. 337.

Recent applications of the test have proved that the Commission was right when, in the *Lenoir* case, it characterized the "primary business test" as one which affords an adequate criterion for the determination of a carrier's status, private or for-hire, despite the simplicity or complexity of fact in any particular case. The test has been approved by the courts and codified by Congress; its reasonableness is now beyond doubt.

CONCLUSION

In view of the history and development by the Commission and the courts as well as by the Congress of the "primary business test," the district court's failure to utilize this test and apply it to the facts developed on the Commission record constitutes serious error. Should this district court decision be allowed to stand without at least a change in the basis on which the decision was made, the "primary business test" as heretofore developed will be severely compromised.

Respectfully submitted,

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